No. 78-1820

In the Supreme Court of the United States

OCTOBER TERM, 1978

ASSOCIATED THIRD CLASS MAIL USERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. The opinion of the district court (Pet. App. 18a-26a) is reported at 440 F. Supp. 1211.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979 (Pet. App. 15a). A petition for rehearing was denied on April 3, 1979 (Pet. App. 16a). The petition for a writ of certiorari was filed on June 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether advertising circulars addressed to particular persons or locations are "letters" within the meaning of the Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1697.

2. Whether application of the Private Express Statutes to such advertising circulars violates the rights of petitioner's members under the First or Fifth Amendment.

STATEMENT

The Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1697, make it generally unlawful for any person other than the Postal Service to send or carry letters on post routes.[1] Pursuant to the rulemaking authority conferred by 39 U.S.C. 401(2), the Postal Service has issued regulations defining the term "letter" as used in the Private Express Statutes. Under the regulations, a letter is "a message directed to a specific person or address and recorded in or on a tangible object." 39 C.F.R. 310.1(a). The definition is amplified by 39 C.F.R. 310.1(a)(3), which provides that "[a] message is directed to a 'specific person or address' when, for

[1] It would perhaps be more accurate to say that the statutes prohibit the carrying of letters over post routes unless the proper postage is affixed and canceled in ink. Under 39 U.S.C. 601, letters may be carried "out of the mails" if certain specified conditions are met. The most significant of these conditions for present purposes are the requirements that such letters bear "the amount of postage which would have been charged on the letter if it had been sent by mail" and that such postage be "canceled in ink by the sender." Of course, in most circumstances, once the appropriate postage has been paid, the sender lacks any financial incentive to send his letters by some conveyance other than the mails. For this reason, the practical effect of the Private Express Statutes is to bar persons other than the Postal Service from carrying letters over post routes.

example, it is directed to a named or identifiable individual, organization, or official, or when it is directed to a specific place." 39 C.F.R. 310.1(a)(6) specifies that "[i]dentical messages directed to more than one specific person or address * * * constitute separate letters."

Petitioner is a trade association of business corporations and charitable organizations that distribute printed messages of various kinds through the mails at third-class postage rates. In particular, petitioner's members use the mails to distribute so-called "public advertisements" a term petitioner defines to mean "printed messages to the public directed in identical form to numerous persons or numerous addresses" (Pet. 4).

In September 1976, petitioner filed this suit in the United States District Court for the District of Columbia. The complaint sought a declaratory judgment invalidating the Postal Service's private express regulations (39 C.F.R. 310.1-310.7) in their entirety or, alternatively, to the extent that they prohibit the private carriage and delivery of "public advertisements." Petitioner also sought a permanent injunction restraining the Postal Service from enforcing its private express regulations and 18 U.S.C. 1696 in connection with "public advertisements." The parties filed cross-motions for summary judgment.

The district court granted summary judgment for the Postal Service (Pet. App. 18a-26a). The court ruled that the limited legislative history of the Private Express Statutes shows that communications such as "public advertisements" are "letters" for private express purposes (*id.* at 22a). The court was not persuaded that a different result is necessary simply because some materials falling within the definition of "letter" in 39 C.F.R. 310.1(a) do not qualify as first-class mail under the Postal Service's rate and inspection classification system. The court

explained that "Congress was not dealing with the same subject or purposes in the classification of letters for rate and inspection purposes and the prohibition of private express for letters" (Pet. App. 22a). The court also rejected petitioner's assertion that "the administrative interpretation of the term 'letter' has been so inconsistent as to invalidate the regulatory definition" (*id.* at 24a). The court observed that the disputed definition was adopted in compliance with the rulemaking procedures mandated by the Administrative Procedure Act. Finally, the court held that the Postal Service's construction of the Private Express Statutes does not violate the rights of petitioner's members to due process, freedom of speech, and equal protection of the laws (*id.* at 24a-26a).

The court of appeals affirmed (Pet. App. 1a-14a). In the court's view, neither the language nor the legislative history of the Private Express Statutes conclusively establishes that the Postal Service's interpretation of the term "letter" accords with congressional intent (*id.* at 4a, 6a). The court stated, however, that "the legislative text and history – while not dispositive of either party's contentions – tends to favor the Postal Service" (*id.* at 7a). With respect to the history of the Service's application of the Private Express Statutes, the court identified several apparent inconsistencies before 1940, but it ruled that whatever ambiguity or inconsistency may have existed in the past does not provide sufficient ground to invalidate the definition of "letter" that the Postal Service employs today (*id.* at 11a). The court held that the Service did not act arbitrarily in focusing on the distinction between messages addressed to a particular person or location, on the one hand, and unaddressed messages, on the other. The court declared that it had "no doubt that the specificity of the addressee is one indici[um] of the common understanding of 'letterness' " (*ibid.*). The court concluded (*id.* at 11a-12a; emphasis in original):

> Advertising circulars are *intended* for the perusal of the addressees. While [petitioner] is doubtless correct that the senders would not object if others saw the circulars, the key fact is that the sender's goal is to reach the particular persons who have been identified as most likely to be interested in the advertised products. It is for this that the sender pays. His attitude toward the possibility that others might happen across his circulars is beside the point.
>
> More broadly, we note that any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines they exclude some matters and include others despite similarities between the two classes. We simply conclude today that the Postal Service has settled upon a reasonable criterion – the presence or absence of an address – and that its definition suffers from no more than the level of arbitrariness which is inevitable.

Judge Wilkey dissented (Pet. App. 13a-14a). He agreed with the majority that the administrative history of the Postal Service's application of the Private Express Statutes is "something of a muddle" (*id.* at 8a, 13a) and asserted that, in his view, the Postal Service "has always latched onto whatever interpretation of the word 'letter' * * * would give it the most extensive monopoly power which Congress at that time seemed disposed to allow" (*id.* at 13a). Judge Wilkey declared that, although the Service's regulations would treat the two differently, he could perceive no distinction between an addressed advertising circular and an unaddressed circular folded within a newspaper that itself is addressed (*id.* at 14a). (Newspapers, whether addressed or not, have historically been exempt from the postal monopoly (see Pet. App. 6a-

7a & n.13) and are not "letters" under the Service's regulation. See 39 C.F.R. 310.1(a)(7)(iv).) Judge Wilkey concluded by suggesting that "[i]f we decline to include the advertising flyers [within the postal monopoly] * * *, we may then force the Postal Service to go to Congress to define accurately the desired postal monopoly scope" (Pet. App. 13a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with the views of any other circuit or depart from any prior ruling of this Court. Further review is not warranted.

1. Petitioner contends (Pet. 7-11) that the Postal Service's definition of "letter" as that term is used in 18 U.S.C. 1696 and the other Private Express Statutes "flies in the face of common and ordinary usage" and therefore does not comport with congressional intent. Petitioner asserts that the principal characteristic of a letter, as that word is ordinarily understood, is that it is intended for the perusal only of the person or the organization to whom it is addressed. In petitioner's view, the addressed advertising circulars distributed by its members do not share this characteristic and therefore are not letters. Petitioner emphasizes that a distributor of such circulars does not seek to limit its audience to particular addressees but instead hopes that its circulars will attract the largest possible number of readers. There are several answers to this argument.

a. In the first place, petitioner's own definition of "letter" assumes that the word is intended to convey the notion of a message addressed to someone. As the court

of appeals observed (Pet. App. 11a; footnote omitted), "[w]e have no doubt that the specificity of the addressee is one indici[um] of the common understanding of 'letterness.' The dictionary definition which [petitioner] would have us adopt is not to the contrary. * * * Advertising circulars are *intended* for the perusal of the addressees." Nevertheless, petitioner insists that the Postal Service erred in emphasizing the fact that a message is addressed and in failing to attribute significance to the breadth of the message's intended audience. But the choice of important criteria in a given definition almost always involves a considerable degree of discretion. In the court of appeals' words, "any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines" (*id.* at 12a).

b. The Postal Service acted reasonably in deciding to concentrate on whether a message is addressed and not to adopt the further requirement that, in order to qualify as a letter, a message must be intended for the perusal of only the addressee. The definition adopted by the Service is easily administered. A simple physical inspection is sufficient to determine whether a given message is addressed to a specific person or location. The additional criterion advocated by petitioners would raise a host of practical problems. In order to decide whether a given message is covered by the postal monopoly, the Service would need to inquire into the intent of the sender. The size of the sender's intended audience would assume critical importance, and the Service would be called upon to draw fine distinctions based on the number of people to whom a message is addressed and the number of people other than the addressees whom the sender wishes to reach. This subjective inquiry would inevitably lead to increased administrative costs and a proliferation of disputes concerning a person's or organization's intent in distributing a particular message.

As the district court and the court of appeals correctly concluded (Pet. App. 5a-7a, 21a-22a), petitioner has not demonstrated that the Postal Service's definition of "letter" is contrary to the intention of the Congress that revised the postal monopoly statute and placed it in its modern form in 1872. Nor has petitioner shown that any subsequent Congress has disapproved the Service's view of the proper scope of the monopoly. Without clear evidence that the Service's regulations are inconsistent with the congressional purpose, the Service's reasonable and easily applied definition of "letter" should not be overturned. This is especially so in light of the serious practical difficulties that can be anticipated in the event petitioner's proposed alternative definition is adopted.

c. While the parties and the courts below agree that few judicial decisions have considered the proper scope of the postal monopoly, the cases that do exist support the Service's position. In *National Association of Letter Carriers* v. *Independent Postal System of America*, 336 F. Supp. 804 (W.D. Okla. 1971), aff'd, 470 F. 2d 265 (10th Cir. 1972), the court of appeals sustained the Service's view that unsealed, printed Christmas cards, bearing no personal message but sent by business entities to particular persons, are "letters" within the meaning of the Private Express Statutes. Such cards are quite similar to the addressed advertising circulars at issue here. They are distributed for business purposes, they are addressed to specific persons or locations, and the sender either hopes that they will be seen by persons other than the addressee or is indifferent to the prospect. See also *United States* v. *Bromley*, 53 U.S. (12 How.) 88, 96-96 (1851) (an unsealed merchandise order sent to a tobacconist is a "letter" within the meaning of the Private Express Statutes); *United States Postal Service* v. *Brennan*, 574 F. 2d 712, 717 (2d Cir. 1978), cert. denied, No. 78-653 (Jan. 15, 1979)

("the authority and necessity for [the Postal Service] to define 'letters' in view of the myriad methods and modes of communication which presently exist is obvious").

d. Petitioner contends (Pet. 9-10), however, that the Postal Service's own interpretation of the word "letter" in the Private Express Statutes has been inconsistent and therefore is not entitled to deference from the courts. This argument is not persuasive.

After reviewing the voluminous administrative materials and the characterization of these materials offered by petitioner and the National Mass Retailing Institute as amicus curiae, the court of appeals concluded that, although "no single definition emerges as the obvious choice of past administrators," the Postal Service's historical practice does not reveal "any clear ground for setting aside the determination of present [officials]" (Pet. App. 8a). The court observed in addition that the "apparent inconsistencies" in the Service's pronouncements on the scope of the postal monopoly during the 1930's "seem to have been resolved in 1940 when the Postal Service stated in a new edition of its pamphlet explaining the Private Express Statutes that 'unaddressed advertising handbills or circulars' were *not* letters, thus setting forth at least by implication the current rule" (*id* at 10a; emphasis in original). Thus, for nearly 40 years, the Service has acted on the assumption that addressed advertising circulars are "letters" covered by the postal monopoly and has not issued any public statement inconsistent with that position.

Moreover, it is undisputed that the definition of "letter" contained in the Service's current regulations was adopted in accordance with the rulemaking procedures mandated by the Administrative Procedure Act. Even if the Service's view of addressed advertising circulars once was different

than it is now, an administrative agency remains free to change its position, so long as it does so in accordance with statutorily required procedures. As this Court stated in *Commissioner* v. *P.G. Lake, Inc.*, 356 U.S. 260, 266 n.5 (1958), "prior administrative practice is always subject to change 'through exercise by the administrative agency of its continuing rule-making power.' "[2]

2. Petitioner maintains that, if the word "letter" in the Private Express Statutes is construed to include addressed advertising circulars, several constitutional problems arise. First, petitioner argues (Pet. 11-12) that the distinction between addressed and unaddressed advertisements is arbitrary and irrational and therefore violates the due process guarantee of the Fifth Amendment. Second, petitioner asserts (Pet. 12-14) that catalogs and newspaper advertising supplements are functionally equivalent to addressed advertising circulars; because such materials are exempt from the postal monopoly under the Service's regulations, petitioner contends that the regulations violate the equal protection component of the Fifth Amendment's Due Process Clause. Finally,

[2]Petitioner and the National Mass Retailing Institute as amicus curiae both express concern (Pet. 10; NMRI Br. 7, 20-24) that the Postal Service will attempt to expand its monopoly to embrace matters properly within the jurisdiction of other government agencies. In particular, they fear that the Service will attempt to regulate the electronic transmission of messages, a subject that is assertedly within the exclusive province of the Federal Communications Commission. But the proposed revision of the postal regulations cited by petitioner and amicus curiae has no bearing on this case. The present dispute concerns only addressed advertising circulars. The courts below did not consider any question regarding the application of the Private Express Statutes to other kinds of messages, and no such question is presented here. The Postal Service's treatment of the "public advertisements" distributed by petitioner's members is based solely on the current version of 39 C.F.R. 310.1(a), and petitioner's effort to expand the controversy to include other matters should be rejected.

petitioner argues (Pet. 14-16) that, when applied to addressed advertising circulars, the Private Express Statutes violate its members' First Amendment right to freedom of speech. Each of these contentions is without merit.

a. The simple answer to petitioner's due process objection is that petitioner's members are free to use unaddressed advertising circulars and thus to avoid the postal monopoly. If the distinction drawn by the Service's regulation is as arbitrary as petitioner contends, advertisers should be willing to forgo addressing their circulars; if they do, they will be able to take advantage of whatever financial benefits private carriage and delivery may offer. On the other hand, as the district court recognized (Pet. App. 25a), if addressing is crucial to petitioner's members' advertising goals, as it appears to be, then petitioner should not be heard to complain that the Postal Service has acted irrationally in using the specificity of a message's address as one criterion for defining the reach of the postal monopoly.

b. Petitioner's equal protection argument fails for similar reasons. The court of appeals correctly noted (Pet. App. 12a) that "any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines—they exclude some matters and include others despite similarities between the two classes." And, as the district court explained (Pet. App. 26a), newspapers and catalogs are reasonably distinguishable from addressed advertising circulars. Newspapers and periodicals have never been subject to the postal monopoly (see Pet. App. 6a-7a & n.13, 21a-22a & n.6), at least in part because Congress and the Service have sought to avoid restrictions on the press. Catalogs, when they become sufficiently large, no longer fit within

the ordinary conception of a letter, and the 24-page standard adopted by the Service's regulations (39 C.F.R. 310.1(a)(7)(v)) was apparently suggested by petitioner itself (see Pet. App. 26a). Indeed, if petitioner's members perceive no difference between newspapers and catalogs, on the one hand, and addressed circulars, on the other, they are free to use one or both of the former methods of advertising and thus to avail themselves of the exemptions provided by the Service's regulations. Petitioner's members have not been subjected, on the basis of some individual characteristic, to any rule not equally applicable to all actual or potential advertisers. Accordingly, they have not been denied the equal protection of the laws.

c. Finally, petitioner's First Amendment claim is insubstantial. The restraint to which petitioner's members are subject "is no different than that placed on any person subject to the Private Express Statutes, which have long been found constitutional" (Pet. App. 25a). See *Ex parte Jackson*, 96 U.S. 727 (1877); *United States Postal Service* v. *Brennan*, *supra*; *United States* v. *Black*, 418 F. Supp. 378 (D. Kan. 1976), aff'd, 569 F. 2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978). Petitioner's reliance on *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), is misplaced. The Court in that case stressed that it was not holding that commercial speech "can never be regulated in any way" (*id.* at 770). Indeed, the Court stated (*id.* at 770-771):

> Some forms of commercial speech regulation are surely permissible. * * *
>
> There is no claim, for example, that the prohibition [at issue here] is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.

The Postal Service regulations defining "letter" satisfy these requirements: they do not refer to the contents of the advertisements distributed by petitioner's members; they serve a significant government interest, the protection of the Postal Service's revenues;[1] and they "leave open ample alternative channels" by which petitioner's members may communicate their advertising message unencumbered by postal restrictions. And, of course, the regulations of which petitioner complains do not impose any prohibition on commercial free speech; petitioner's members retain the option to distribute their advertisements by mail at the Service's reasonable third-class rates. The regulations therefore do not impose any impermissible burden on commercial free speech.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

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[1] See *Council of Greenburgh Civic Associations* v. *United States Postal Service*, 586 F. 2d 935, 938 (2d Cir. 1978) (Kaufman, C.J., concurring; footnote omitted):

> Insofar as the statute is intended to prevent commercial concerns from conducting their business via an alternative to postal delivery, this is unquestionably a valid interest.